Supreme Court, U.S.
FILED
AUG 28 2003
OFFICE OF THE CLERK

(2)

No. 03-160

IN THE

Supreme Court of the United States

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Petitioners,

v.

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* ARKANSAS INSURANCE DEPARTMENT, ARKANSAS INSURANCE COMMISSIONER MIKE PICKENS, IN SUPPORT OF PETITIONERS

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The Arkansas Insurance Department (Department), Arkansas Insurance Commissioner Mike Pickens, respectfully requests permission to file the attached brief *amicus curiae*, pursuant to Rule 37.2(b). Petitioners have consented to the filing of this Brief.[1] Respondent has withheld consent.

[1] Petitioners' letter expressing consent has been filed with the Clerk of the Court.

The Department regulates the insurance industry in the State of Arkansas. The Department's primary mission is "consumer protection through insurer solvency and market conduct regulation, and fraud prosecution and deterrence." Ark. Code Ann. § 23-61-101(c)(1)(B). The Department's interest in this litigation arises out of its duty to protect Arkansas consumers.

Because of huge verdicts like the one at issue in this case, nursing homes have an almost impossible time finding liability insurance. The lack of long-term care liability insurance has a profound effect on the insurance industry and citizens of the State of Arkansas. .

Arkansas Insurance Commissioner Mike Pickens[2] has met with both nursing home resident advocates and nursing home owners/operators to try to find a solution to this common problem. Commissioner Pickens has written, and been written about in, numerous articles on the subject. Elizabeth Caldwell, *Lawyers Criticize Insurance Commissioner's Call for Reform*, DONREY NEWS, LITTLE ROCK BUREAU, Oct. 4, 2001, *available at http://*www.nwaonline.net; Gwen Moritz, Editor's Note, *Man Bites Dog*, ARK. BUS., Oct. 8, 2001, at 7; David Smith, *Insurance Chief Blasted for Idea on Tort Reform*, ARK. DEMOCRAT-GAZETTE, Oct. 9, 2001, at 1D, 2D; Doug Smith, *Insurance Commissioner Touts Tort Reform*, ARK. TIMES, Oct. 12, 2001; Gwen Moritz, *Higher Rates Stanch Nursing Homes' Red Ink*, ARK. BUS., Feb. 4-10, 2002; Press Release, Arkansas Insurance Department, Advocates for Nursing Home Residents, Nursing Home Owners and the Insurance Department Meet to Find Common Ground (March 18, 2002) (on file with the Department); Curt Hodges, *Insurance Commissioner Discusses Unlicensed Sales, Tort Reform*, JONESBORO SUN, Nov. 21, 2002; Mike Pickens, Special to the Democrat-Gazette, *Tort Reform Allows Better Access to Courts, Civil Justice for Aggrieved*, ARK. DEMOCRAT-GAZETTE, Jan. 12, 2003 (on file with the Department); Mike Pickens, *Calling It Like It Is: Civil Jus-*

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[2] Commissioner Pickens is currently serving as President of the National Association of Insurance Commissioners.

tice Reform, 4 THE AID NEWSLETTER 1, Winter/Spring 2003 (on file with the Department).

He has also written numerous letters to the media and lawmakers about the need for consistency and predictability with regard to jury awards. Letter from Mike Pickens to The Honorable Jon Fitch, Chairman, The Honorable Steve Napper, Chairman, Senate and House Insurance and Commerce Committee Members (March 29, 2001) (on file with the Department); Letter from Mike Pickens to Mr. Paul E. Harrison, President, Arkansas Trial Lawyers Association (November 21, 2001) (on file with the Department); Letter from Mike Pickens to Mr. Paul Greenberg, Editorial Page Editor (October 11 2001) (on file with the Department); Letter from Mike Pickens to The Honorable Samuel E. Ledbetter, State Representative (October 8, 2001) (on file with the Department); Letter from Mike Pickens to Ms. Nancy Johnson, Vice President, Arkansas Advocates for Nursing Home Residents (February 7, 2002) (on file with the Department); Letter from Mike Pickens to The Honorable Bob Adams, State Representative (December 20, 2002) (on file with the Department); Letter from Mike Pickens to The Honorable Paul Bookout, Chairman, The Honorable Lindbergh Thomas, Vice Chairman, House Insurance and Commerce Committee Members (February 12, 2003) (on file with the Department); Letter from Mike Pickens to The Honorable Ed Wilkins, Chairman, The Honorable Jim Luke, Vice Chairman, Senate Judiciary Committee Members (February 19, 2003) (on file with the Department); Letter from Pickens to the Editor, c/o Doug Smith, *Arkansas Times* (May 20, 2003) (on file with the Department).

The Commissioner is in the unique position of hearing firsthand the cause and effect of this problem. The Department held a hearing in September 2001 to determine if long-term care liability insurance coverage was reasonably available in the state. Both nursing home owners/operators and insurance industry representatives testified to what they call a "crisis." As discussed in detail in the attached brief, the evidence showed that large jury verdicts are a major reason there is virtually no liability insurance market for Arkansas nursing homes. The obvious due process/fair trial issues

raised by this case have sent shock waves through the Arkansas insurance market and will undoubtedly only exacerbate Arkansas' already highly stressed nursing home liability and medical malpractice markets.

The Department and Commissioner Pickens respectfully request leave of the Court to file the attached brief *amicus curiae*.

Respectfully submitted,

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(Ark. Ins. Dep't Oct. 1, 2001) ..... *passim*

Pursuant to Supreme Court Rule 37, the Arkansas Insurance Department (Department), Arkansas Insurance Commissioner Mike Pickens, submits this Brief in support of Petitioners Advocat, Inc., Diversicare Leasing Corporation, d/b/a Rich Mountain Nursing and Rehabilitation Center, and Diversicare Management Services Company and respectfully requests that the Court issue a writ of certiorari to review a judgment of the Arkansas Supreme Court entered in the action.[1]

INTEREST OF THE *AMICUS CURIAE*

The Department regulates the insurance industry in the State of Arkansas. The Department's primary mission is "consumer protection through insurer solvency and market conduct regulation, and fraud prosecution and deterrence." Ark. Code Ann. § 23-61-101(c)(1)(B). The Department's interest in this litigation arises out of its duty to protect Arkansas consumers.

On September 19, 2001, Arkansas Insurance Commissioner Mike Pickens held a fact-finding public hearing to determine whether long-term care liability insurance coverage[2] was reasonably available in the state. Based on the evidence presented, he concluded that nursing home liability coverage was not reasonably available in Arkansas.

Arkansas insurance consumers suffer if a nursing home does not have liability insurance coverage. Often, nursing home financing agreements require liability coverage. If a home either cannot afford or cannot find such coverage, the home is in breach of its financing agreement and risks foreclosure. If a nursing home is forced to close, residents will

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* Arkansas Insurance Department authored this Brief in its entirety, and no person or entity made a monetary contribution toward the preparation or submission of this Brief.

[2] In this Brief, the terms "long term care liability insurance coverage" and "nursing home liability coverage" are used interchangeably.

have to relocate. The remaining homes face overcrowding, and residents may have no place for their loved ones who need round-the-clock professional care.

Evidence presented at the hearing showed that large verdicts, specifically the verdict at issue in this case, are the major reason Arkansas nursing homes have an almost impossible task when seeking liability coverage. Due to large jury verdicts, Arkansas nursing homes pose an uncertain risk. Insurers have trouble quantifying the risk, since there is virtually no limit to a potential judgment. When insurers attempt to price for the actual risk assumed, the premiums are frequently too costly for most homes to afford. Funds that should go to patient care must go to pay the high cost of insurance. Furthermore, in an attempt to reduce the potential risk, insurers use strict underwriting guidelines that severely limit the coverage provided. Some homes do not meet the underwriting guidelines, and insurers are unwilling to offer coverage. Many Arkansas nursing homes face the prospect of going without liability insurance coverage.

The lack of this coverage will directly affect Arkansas consumers. The extra costs of insurance, or of doing business without insurance, will ultimately be passed on to Arkansas nursing home residents and their families. To prevent the potentially devastating effects of the lack of long-term care liability insurance coverage, the Department and Commissioner Pickens respectfully request that this Court issue a writ of certiorari in this matter.

SUMMARY OF ARGUMENT

This verdict in this case affects not only the parties to the case, but the entire State of Arkansas. Nursing home owners face the prospect of running their homes without liability insurance, which places the homes at risk of foreclosure. Nursing home residents would then be forced to relocate. The remaining homes would face overcrowding, and some residents may ultimately have no place to go.

Astronomical verdicts like the one at issue show insurers that the sky is the limit in Arkansas. Insurers have an extremely difficult time pricing the risk posed by an Arkansas nursing home. When an insurer tries to price the risk, the cost is so high that most nursing homes cannot afford the coverage. Money earmarked for patient care must instead be used to pay astronomical insurance premiums.

This Brief will describe the long-term care liability insurance situation in Arkansas on September 19, 2001, as well as the reasons for the situation. The petition for certiorari should be granted.

ARGUMENT

On April 18, 2001, Arkansas Governor Mike Huckabee signed Act 1825 of 2001. 2001 Ark. Acts 1825. The Act authorized Arkansas Insurance Commissioner Mike Pickens[3] to create a long-term care liability pool if he found that long-term care liability insurance coverage was not reasonably available in the State of Arkansas. *Id.*

On September 19, 2001, Arkansas Insurance Commissioner Mike Pickens held a public hearing to determine if long-term care liability insurance was reasonably available in Arkansas. The attendees included representatives from the nursing home industry, the media, a representative from the governor's office, and a state representative.[4] After hearing the testimony and reviewing the documentary evidence, Commissioner Pickens concluded that long-term care liabil-

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[3] Commissioner Pickens is currently serving a year-long term as president of the National Association of Insurance Commissioners.

[4] Although all interested parties were invited, no representatives from the plaintiff's bar or consumer groups representing nursing home residents attended. Transcript at 59. For purposes of this Brief, "Transcript" refers to the transcript of the Department's hearing on September 19, 2001, "In the Matter of: Nursing Home Liability Insurance Availability." Exhibits to the transcript will be cited as "Ex. X" followed by a complete description of the exhibit.

ity insurance was not reasonably available in Arkansas. In the Matter of the Reasonable Availability of Long-Term Care Liability Insurance in the State of Arkansas, AID Order No. 2001-229 (Ark. Ins. Dep't Oct. 1, 2001).

The evidence presented at the hearing gave a dim view of the long-term care liability insurance situation in Arkansas. Such evidence included the results of a survey conducted by the Department. The Department polled the long-term care liability insurance carriers that wrote this coverage in the state to see how much of this coverage they were still writing in Arkansas.[5] Transcript at 6. William R. Lacy, Director of the Department's Property and Casualty Division, testified to the survey's results. He said that nursing home liability coverage from a carrier admitted to do business in Arkansas is difficult to find. Transcript at 8. Out of 80 carriers authorized to write this coverage, only one carrier is active in the market. *Id.* This carrier had three (3) policies and was not accepting new business. *Id.* The carrier is using stringent underwriting guidelines, so the three (3) policies in force may or may not be renewed. *Id.* Two (2) other carriers filed nursing home liability insurance products but never issued a policy. *Id.* Practically, no coverage is available in the admitted market. Transcript at 16. Director Lacy testified that surplus lines[6] insurance carriers provide most of the nursing home liability coverage in Arkansas. Transcript at 8.

Witnesses testified that the situation is dire. Representa-

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[5] The survey was sent to many insurers, but the results entered into the records where those from carriers who had written nursing home liability coverage here or who had received Departmental approval for such products. Transcript at 7-8.

[6] Surplus lines carriers are not directly regulated by the Department. Transcript at 14. Licensed carriers apply to do business in a state and file rates. Transcript at 14-15. The Department regulates their solvency, and the Guaranty Fund steps in to pay claims if an admitted carrier becomes insolvent. *Id.* Surplus lines carriers take a risk if no admitted carrier is willing to take that risk. Transcript at 15. The Guaranty Fund does not pay the claims if a surplus lines carrier becomes insolvent. *Id.* Lloyd's of London is an example of a surplus lines carrier. Transcript at 15-16.

tives of Beverly Enterprises (Beverly) said a crisis exists. Transcript at 43. Beverly is the largest nursing home corporation in Arkansas and the United States. Transcript at 58. Beverly had an over 300% increase in its litigation volume since 1998 for its Arkansas homes. Transcript at 39. Beverly was at the end of a multi-year insurance plan and had exhausted both the Arkansas and the surplus lines markets trying to find new coverage. Transcript at 45, 46. Beverly was planning to go overseas to try to find coverage. Transcript at 45. When a company with Beverly's size and buying power has such trouble finding insurance coverage, the situation is even blacker for the smaller homes.

The Beverly representatives pointed out that many homes have bank financing agreements that require the homes to carry liability coverage. Transcript at 40; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3. A home without insurance faces the possibility of having its loan called, which would result in the home's demise. Transcript at 40; Ex. 9, Letter from Goss, to Pickens of 9/19/01, at 3. The nursing home employees would lose their jobs. Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3. The home's residents would have to find somewhere else to go. Ex. 9, Letter from Goss to Pickens of 9/19/02, at 3. The remaining nursing homes would face overcrowded conditions. Some residents could be turned away and have nowhere to go.

Although nursing homes receive reimbursement from Medicaid, nursing homes cannot rely on Medicaid reimbursement to assist in the payment of higher insurance rates. The reimbursement process is so slow that a nursing home would have to pay for a second year premium before it is reimbursed for the previous year's premium. Transcript at 42; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 4.

Furthermore, nursing home closures could have an effect on state Medicaid funding. Transcript at 41; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3-4. The Arkansas State Medicaid plan must give the federal government assurances regarding reasonable and adequate access to covered ser-

vices. Transcript at 41; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3-4. Nursing home closures could cast doubt on these assurance and risk millions of dollars of federal Medicaid funds. Transcript at 41; Ex. 9, Letter from Goss to Pickens of 9/19/01, at 3-4. Since Medicaid covers only a portion of the expenses of Medicaid residents, private pay patients will have to pay substantially more to cover the increased costs of liability insurance. Ex. 9, Letter from Goss to Pickens of 9/19/01, at 4.

All Arkansas nursing homes end up paying the cost of huge judgments, not just the homes against whom the judgments are rendered. Bud Bulloch is an Arkansas insurance agent specializing in insurance coverage for nursing homes, and he is also a nursing home owner. Transcript at 60, 61; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. He testified that there was no nursing home liability insurance market in Arkansas seeking new business. Transcript at 61-62; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. One or two carriers might provide coverage for a limited number of non-profit homes, but most homes he insured had to obtain coverage from the surplus lines market. Transcript at 62; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. Surplus lines coverage meant inferior coverage. Transcript at 62; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. The surplus lines carriers refused to insure punitive damages. Transcript at 76-77. These carriers would not cover physical and sexual abuses in the homes, and these coverages are very important to nursing homes owners. *Id.* Surplus lines coverage also meant high deductibles, and high prices. Transcript at 62; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1.

As an example of the current situation, Mr. Bulloch described an excellent non-profit home he was trying to insure that could not obtain affordable coverage. Transcript at 62-63; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. This home had never had a patient care claim, had good management and nursing, excellent state survey results, and good financials. Transcript at 62-63; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 1. The only coverage this home could

purchase was at a 300% price increase from what it paid the year before; the new coverage had a high deductible and, unlike last year, no umbrella coverage. Transcript at 63. The coverage purchased the previous year was also at a 300% increase from the year before that, *Id.*, for a total 600% price increase in the last two (2) years. In Mr. Bulloch's opinion, the $130,000 cost for the home's coverage would be more than most homes would make in a year. Transcript at 73-74. Even though the home in this example had never had a claim, it nonetheless was having the same trouble as all the other homes had when trying to find coverage. All homes are equally affected by this crisis, regardless of the homes' quality of care and claims history.

Mr. Bulloch noted that there was a raise in the reimbursement system. Transcript at 70. Nursing home owners that originally planned to use this money for patient care had to spend it on insurance. *Id.* Nursing home residents suffer when money goes to insurance instead of their care.

Mr. Bulloch stated that the insurance industry considers Arkansas "the worst of the worst" when it comes to Arkansas' ability to provide nursing home liability coverage. Transcript at 64; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 2. Carriers would not write business here. Transcript at 65; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 2. Mr. Bulloch mentioned a major surplus lines carrier that cancelled all its nursing home liability coverage mid-term and forced those homes to try to find coverage elsewhere. Transcript at 79. According to Mr. Bulloch, ". . . what's out there today probably won't be there six months from now." Transcript at 77-78.

Bud Bulloch has all of his assets in his nursing homes, and his personal guaranty is on the bank notes. Transcript at 74. If one of his nursing homes is sued for millions of dollars, he faces personal financial ruin. *Id.*

According to Mr. Bulloch, the situation was getting worse. The underwriting was getting tougher. Transcript at 64; Ex.

3, Letter from Bulloch to Farris of 9/11/01, at 2. The surplus lines carriers were running out of capacity. Transcript at 64; Ex. 3, Letter from Bulloch to Farris of 9/11/01, at 2. Mr. Bulloch, like all the other nursing home owners who testified, was desperate to find coverage for his nursing homes.

Leon Catlett is an Arkansas nursing home operator with six (6) facilities. Transcript at 81. He sent his homes' application for coverage to 36 carriers and received only one quote. *Id.* Coverage for the previous year cost $89,000; coverage for the next year would be $1,030,000. *Id.* He cannot afford those prices. Transcript at 82. He exhausted the American and overseas markets, Transcript at 83, and was applying with Lloyd's of London. Transcript at 82. As of the hearing date, his homes did not have insurance coverage. Transcript at 83. Mr. Catlett knew about 22 homes in Arkansas that would not have liability coverage. Transcript at 82.

Brownwood Manor, a nursing home in Fort Smith, sent a letter introduced as an exhibit at the hearing. Transcript at 82-83; Ex. 10, Letter from Hickey to Morton of 9/17/01. The lowest quote Brownwood Manor received for liability insurance was $247,000.00, or $2,266 per bed. Transcript at 83; Ex. 10, Letter from Hickey to Morton of 9/17/01. At the time of the hearing, Brownwood Manor was without insurance for the first time in its twenty-seven (27) years of operation. Transcript at 83; Ex. 10, Letter from Hickey to Morton of 9/17/01.

Alan Curtis works for Crestpark Nursing Homes, which has eight homes. Transcript at 86; Ex. 4, Letter from Curtis to Farris of 9/14/01. The homes' liability coverage went from $45,000 in 2000 to $520,000 in 2001, in spite of the fact that the homes had no claims filed. Transcript at 86; Ex. 4, Letter from Curtis to Farris of 9/14/01. Mr. Curtis's current carrier told him that if the carrier decides to write in 2002, his premium would double. Transcript at 86; Ex. 4, Letter from Curtis to Farris of 9/14/01. His nursing home will probably not have any coverage after December. Transcript at 86.

Marty Rhodes is president of Rhodes & Associates, a Little Rock insurance agency specializing in nursing home insurance. Transcript at 87. In his twenty-eight (28) years as an insurance agent, Marty Rhodes had never seen a crisis like the one at issue. Ex. 5, Martin M. Rhodes, Statement Before Arkansas HR Judiciary Committee, Feb. 22, 2001, at 1. Before mid-2000, nursing home liability coverage averaged $50 per bed, with a $1 million dollar limit per incident. *Id.* In 2001, if a home could get insurance, the coverage costs a minimum of $400 per bed and sometimes up to $1,500 per bed. *Id.* Some facilities dropped their excess coverage. *Id* at 2. The coverage available in 2001 was more restrictive, with punitive damages and abuse excluded from coverage. *Id.*

Rhodes pointed out that many nursing homes have financing agreements that require the homes to have liability coverage. *Id.* Without such insurance, these nursing homes would be in default of their financing agreements. *Id.* Rhodes knew nine (9) homes without insurance. *Id.* As such, the employees were not covered, which affects the home's ability to hire staff. *Id.* No one wants to work for a home that does not have insurance to cover him. For the previous five (5) years, Rhodes & Associates had exclusive contracts with admitted carriers that have since withdrawn from the market. Transcript at 88. According to Marty Rhodes, "the market place has just dried up." Transcript at 90.

Brandon Adams is president of a nursing home company that has eight (8) nursing homes. Transcript at 91. According to Mr. Adams, ". . . the train wreck is just beginning and it gets worse every day. . . ." *Id.* Mr. Adams has also personally guaranteed his bank notes. *Id.* He could not get coverage for his nursing homes. Transcript at 101. Insurance agents were telling him that no carrier had affordable coverage. Transcript at 101-02. Mr. Adams pointed out that the situation creates a problem within the state. Transcript at 98. He asked, "[w]hat are we going to do with the 27,000 people that are in our nursing homes?" Transcript at 95.

Arkansas State Representative Roger Smith testified that he had heard from the families of nursing home residents and from people who may be future nursing home residents. Transcript at 102-03. Although people complained about nursing home care, he most often heard from people concerned about losing their local nursing homes. Transcript at 104-05. If these nursing homes closed, these people did not know where they would take their loved ones. Transcript at 105.

Representative Smith said we were quickly approaching a crisis. *Id.* The nursing home owners who testified at the hearing had invested in what used to be a good business, and they had intended to provide quality care for the elderly in their community. *id.* According to Representative Smith, ". . . today they're struggling just to keep their doors open." *Id.*

Representative Smith discussed a state law that created a quality assurance fee to be borne by the nursing homes. Transcript at 106. With the Medicaid matching funds, the fee was going to inject $120 million to $130 million dollars into nursing homes for patient care. *Id.* Sixty percent of the money was to be used for direct care, and 40% was to be used for indirect care. *Id.* Instead, more money was being used for indirect costs, such as high liability insurance, and less was being used for direct patient care. *Id.*

Representative Smith noted that the cost of nursing home care has risen dramatically. Transcript at 108. He visited a constituent whose husband had been a nursing home patient for over five (5) years. Transcript at 108-09. Her husband was a private pay patient, and it cost $50,000 annually to keep him in the nursing home. Transcript at 109. The constituent had been advised by her attorney that she would have to divorce her husband at some point, so she will have some assets left to pay for her own care when the time came. *Id.*

On October 1, 2001, Commissioner Pickens signed Order No. 2001-229. In the Matter of the Reasonable Availability

of Long-Term Care Liability Insurance in the State of Arkansas, AID Order No. 2001-229 (Ark. Ins. Dep't Oct. 1, 2001). In this Order, he found that long-term care liability insurance coverage was not reasonably available in the State of Arkansas. *Id.* The Order noted that, since April 2001, judgments against Arkansas nursing homes totaled at least $93 million. *Id.* The Order listed the following as reasons for the situation:

a. Increasing loss severity
b. Difficulty predicting future loss trends
c. Difficulty in pricing, due to escalating court judgments and settlements
d. Better risk management is needed
e. Financial condition of long-term industry is perceived to be poor
f. Low/slow Medicare reimbursement rates
g. Lack of reinsurance

Id.

Most carriers refuse to write nursing home liability insurance in Arkansas due to a lack of meaningful civil justice reform. *Id.* Director Lacy testified that judgments against nursing homes are increasing in amount. Transcript at 9-10. A Beverly representative noted that, in the past 120 days, $100 million dollars in judgments were entered against Arkansas nursing homes. Transcript at 38. All nursing homes, and ultimately all nursing home residents, will ultimately end up paying for these judgments.

Director Lacy explained that actuaries try to predict future losses based on what has happened in the past. Transcript at 21. Because of the escalating judgments, insurers cannot look to a home's past loss history to predict future losses. Transcript at 10. Insurers, therefore, have a hard time pricing coverage; if they do price in accordance with the risk assumed, the price is very high. *Id.* Director Lacy testified that insurers need effective reform that will limit how high a judgment can go. Transcript at 10. Insurers could then better predict a

nursing home's future losses and properly price coverage. *Id.* Bud Bulloch agrees that no insurer would take on the risk Arkansas nursing homes present. Transcript at 67.

All homes, not just the homes with high claims histories, pay for these high judgments. Arkansas has a small market, so high verdicts have a greater impact. Transcript at 9. Director Lacy pointed out that the verdict in this case, if spread over the 22,000 beds in Arkansas nursing homes, results in $3,000 per bed. *Id.* Even homes with no claims history are affected by these judgments. All homes pay for these judgments, not just the homes against whom the verdicts are rendered.

Marty Rhodes agrees that the current legal climate is the main reason for the unavailability of this coverage. Ex. 5, Martin M. Rhodes, Statement Before Arkansas HR Judiciary Committee, Feb. 22, 2001, at 3. The large judgments and increased number of lawsuits have directly affected the affordability and availability of coverage. *Id.* In his written statement, he points out that a carrier's loss exposure in the Arkansas market could far exceed the amount of premium collected. *Id.* It would be ludicrous for an insurer to take on that risk. *Id.*

Since the hearing, the situation has worsened.[7] On July 21, 2003, ArkansasBusiness.com reported the results of a nursing home survey conducted by the Arkansas Health Care Association. Alicia Stogner, *Insurance Premiums Continue to Rise*, ArkansasBusiness.com, (July 21, 2003) *available at* http:wwwarkansasbusiness.com. The survey showed that 103 out of 225 Arkansas nursing homes cannot afford or obtain liability insurance, due to the high cost of coverage. *Id.* Premiums spiked from $658,796 in 1999 to nearly $14 million in 2002, which is a 2,025.1% increase. *Id.* Medical directors and doctors have left nursing homes that do not have liability coverage, and other such professionals "are reluctant" to

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[7] The long-term care liability insurance pool did not get off the ground due to a lack of participation.

work under the "insurance crisis conditions." *Id.* The situation saps nursing homes' ability to increase direct care to patients. *Id.*

In 2001, nursing home operators and insurance industry representatives said Arkansas was in the midst of a crisis. Nursing homes could not find good liability coverage. What they find they could not afford. The surplus lines carriers still writing this coverage were running out of capacity. Money that should go to patient care was going to cover the high cost of substandard insurance coverage. The homes faced doing business without coverage and potential foreclosure. Nursing home residents would have to find somewhere else to go, but such places may not have room for them. Private pay patient would have to pay increased costs for their care, due to high premiums and slow federal reimbursements. Large verdicts such as the one at issue in the case ultimately bleed over into the pockets of the entire State of Arkansas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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